EXHIBIT B

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FUJITSU LIMITED and FUJITSU MICROELECTRONICS AMERICA, INC.

Plaintiffs,

vs.

NANYA TECHNOLOGY CORP. and NANYA TECHNOLOGY CORP. U.S.A.

Defendants.

Action No. C06-06613 EDL

NOTICE OF MOTION; MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, TRANSFER OR STAY CASE

Date: January 30, 2007
Time: 9:00 A.M.
Location: Courtroom E, 15th Floor

NOTICE OF MOTION AND MOTION

Please take notice that pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(5) and Civil L.R. 7-2, Defendants Nanya Technology Corp. ("NTC") and Nanya Technology Corp. U.S.A. ("NTC USA") move the Court for an order dismissing Plaintiffs' complaint, transferring this case to the United States District Court for the District of Guam, or staying this case because there is a first-filed action in the United States District Court for the District of Guam with identical parties and issues.

This motion will be and is based on the accompanying memorandum of points and authorities, the Declaration of Alfonso Garcia Chan, the Declaration of Ken Hurley, the request for judicial notice, the papers and pleadings already on file in this Court, and any other evidence or argument that may be presented through the hearing of the motion.

INTRODUCTION

This lawsuit represents a blatant attempt at forum shopping by Fujitsu Limited ("Fujitsu Ltd.") and Fujitsu Microelectronics America, Inc. ("FMA"). On September 13, 2006, NTC and NTC USA filed suit against Fujitsu Ltd. and FMA in the United States District Court of Guam.[1] The Guam Suit shares the same parties and substantially the same issues as this action. There is no valid reason for this Court not to defer to the first-filed Guam Suit. In fact, the District of Guam is the closest United States federal district to Japan and Taiwan, where the primary parties are headquartered and where essentially all relevant documents and important witnesses are located. The District of Guam is not only the venue of the first-filed action, but also the most convenient forum. Defendants therefore respectfully request that the Court dismiss this case, transfer it to the District of Guam, or stay the case pending the outcome of the Guam Suit.

I. FACTS

A. The First-Filed Guam Suit Came After Years of Failed Negotiations

Over the past seven years, Fujitsu Ltd. has used unlawful threats and coercion in an attempt to intimidate NTC into paying ***worldwide*** "licensing fees" on Fujitsu Ltd.'s Japanese and U.S. patents

[1] *Nanya Technology Corp. v. Fujitsu Limited et al*, Case No. 1:06-CV-00025 (D. Guam) ("Guam Suit").

related to computer memory chips.[2] NTC clearly demonstrated to Fujitsu Ltd. that NTC did not and does not infringe the asserted patents — many of which have expired, and almost all of which are demonstrably invalid or unenforceable.

Despite several years of good faith negotiations on the part of NTC, Fujitsu Ltd. sued NTC in Tokyo District Court in 2005.[3] That suit alleges only the infringement of a single Japanese patent.[4] Continuing its pattern of extortion and intimidation, during settlement negotiations in the Japanese Suit, Fujitsu Ltd. demanded that NTC take a ***worldwide*** license to settle the Japanese Suit or Fujitsu would seek to bar NTC from the Japanese market via an injunction. In those discussions, Fujitsu Ltd. continued to assert several expired U.S. patents — thus tying access to the Japanese market to licenses covering unenforceable U.S. patent rights.[5] These recent settlement negotiations related to Fujitsu Ltd.'s claims have been ongoing for months in Tokyo, Japan.[6]

B. NTC Files Suit in Guam—The Closest Court to Taiwan and Japan

Because of Fujitsu Ltd.'s improper licensing demands, its threats of infringement of several U.S. patents, and its attempt to extort a worldwide license to settle the Japanese suit, on September 13, 2006, NTC sued Fujitsu Ltd. in Guam.[7] In the Guam Suit, NTC asserts claims for antitrust violations based on Fujitsu Ltd.'s coercive misuse of its patent portfolio, claims for infringement of NTC's patents on related technology, and claims for a declaration that certain Fujitsu Ltd. patents asserted in the Japanese negotiations are invalid, unenforceable, or not infringed by NTC.[8]

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[2] *See* Declaration of Alfonso G. Chan in Support of Defendants' Motion to Dismiss, Transfer or Stay Case (hereafter "Chan Decl."), ¶ 2.

[3] *Fujitsu Limited v. Nanya Technology Corporation*, No. (wa) 17182 2005 (Heisei 17), pending in Civil Division 46, Tokyo District Court ("Japanese Suit").

[4] Chan Decl. ¶ 2.

[5] *Id.* ¶ 3; At one time or another, Fujitsu Ltd. has explicitly accused NTC of infringing United States patents including Patent Nos. 4,641,166 ("'166 Patent"); 4,458,336 ("'336 Patent"); 5,688,712 ("'712 Patent"); 5,841,731 ("'731 Patent"); 4,692,689 ("'689 Patent"); 4,527,070 ("'070 Patent"); 4,384,918 ("'918 Patent"); 4,539,068 ("'068 Patent"); 5,397,432 ("'432 Patent"); 5,227,996 ("'996 Patent"); 5,339,273 ("'273 Patent"); 4,801,989 ("'989 Patent"); 6,104,486 ("'486 Patent"); 6,292,428 ("'428 Patent"); and 6,320,819 ("'819 Patent").

[6] Chan Decl. ¶ 2.

[7] *Id.* ¶ 4. The Guam Complaint is attached as an exhibit to Alfonso Chan's declaration which is filed concurrently with this motion.

[8] *Id.* ¶ 3; Pl.s' First Am. Compl., Dkt. No. 24, *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. CV-06-00025

NTC chose the District of Guam for several valid reasons. First, Guam is the closest United States District Court to both Fujitsu Ltd. and NTC.[9] There is only a one hour time difference between Guam (GMT +10 hours) and Tokyo (GMT +9 hours).[10] Flights from Tokyo, Japan or Taipei, Taiwan to Guam are direct and about three and one-half hours — as compared to nine hours to the San Francisco Bay Area.[11] Litigation in Guam would require the least amount of disruption to NTC's operations, as their engineering staff could commute easily to and from court to testify and support the litigation. All the inventors of NTC's U.S. patents at issue reside in Taiwan.[12] Taiwan is where NTC's chip fabrication plants are located, as well as the technical design and manufacturing records regarding the products at issue.[13] All of NTC's corporate representatives that have the most knowledge of the technology and economics regarding DDR SDRAM reside in Taiwan.[14] Guam is clearly the most convenient forum for ***both*** NTC and Fujitsu Ltd.[15]

C. NTC Hand Delivered a Copy of the Guam Suit to Fujitsu Ltd. and Agreed to Further Negotiations

On September 14, 2006, in Tokyo, Japan, NTC's counsel delivered a copy of the Guam complaint to Fujitsu Ltd. during a settlement conference.[16] At the conference and during subsequent negotiations, Fujitsu Ltd.'s representatives repeatedly asked that NTC forego formal service of the complaint to allow further informal settlement negotiations before litigation intensified. Acting in a good faith effort to continue settlement negotiations, NTC's counsel agreed, and Fujitsu Ltd. was not formally served.[17]

(D. Guam)

[9] Chan Decl. ¶ 5.

[10] *Id.* ¶ 6.

[11] *Id.* ¶¶ 7, 8.

[12] *See* Declaration of Ken Hurley in Support of Defendants' Motion to Dismiss, Transfer or Stay Case, ¶ 4.

[13] Hurley Decl. ¶ 7, 8.

[14] *Id.* ¶ 9.

[15] *Id.* ¶ 9.

[16] Chan Decl. ¶ 10.

[17] *Id.* ¶ 11.

D. Fujitsu Ltd. and FMA File a Copycat Suit in This Court

NTC's reliance on Fujitsu Ltd's request to forego service and continue negotiations was misplaced. On October 24, 2006 — the day before the parties were to meet again in Tokyo, Japan to discuss settlement— Fujitsu Ltd. and FMA filed this lawsuit.[18] Fujitsu Ltd. and FMA have admitted in papers filed in the Guam Suit that the only reason they filed this case was "in response to the filing of the Guam complaint."[19] On November 2, 2006, Fujitsu Ltd. and FMA served NTC USA.[20] Fujitsu Ltd. and FMA have attempted to serve NTC in Taiwan, but as discussed in NTC's motion to quash service, that service is defective absent an order from this authorizing an alternative means of service.

Once NTC realized that Fujitsu Ltd.'s and FMA's request to continue negotiations was merely a ruse to buy time to prepare their own suit, NTC initiated service of the Guam suit. On October 31, 2006, NTC and NTC USA served FMA with the Guam lawsuit.[21] On November 9, 2006, the Guam court signed an order authorizing alternative service on Fujitsu Ltd. in Japan by email and overnight mail.[22] The next day, November 10, 2006, NTC and NTC USA served Fujitsu Ltd.[23] On November 17, 2006, NTC amended its complaint in the Guam action to include NTC USA as a party.[24] It was served upon both Fujitsu Ltd. and FMA the next day.[25]

While the Guam Suit has more patents at issue, these two cases now have the exact same parties and essentially the same issues. This Court will have to construe the claims and determine infringement or non-infringement of at least seven of the patents that are also at issue in the Guam action (the Guam action concerns eighteen patents).[26]

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[18] *Id.* ¶ 12.
[19] Fujitsu Limited's Mem. of Points and Authorities in Support of Its Objections to The Magistrate's Order Granting Mot. for Alternative Service of Process on Fujitsu Limited, Dkt. No.45, *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. CV-06-00025 (D. Guam), at 3.
[20] Aff. of Service of Summons, Dkt. No. 11.
[21] Chan Decl. ¶ 13.
[22] *Id.* ¶ 14; Order Dkt. No.24, *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. CV-06-00025 (D. Guam), at 3.
[23] *Id.* ¶ 15.
[24] *Id.* ¶ 16; Pl.'s First Amended Complaint, Dkt. No.24, *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. CV-06-00025 (D. Guam).
[25] Chan Decl. ¶16.
[26] *Id.* ¶ 17.

At this stage, the Guam suit is also further along in the proceedings and moving at a much faster pace than this suit. First, the Guam court has directed the parties to file a proposed scheduling order and discovery plan by November 27, 2006,[27] and NTC's counsel has forwarded drafts of the proposed scheduling order to Fujitsu Ltd.'s and FMA's counsel.[28] Second, the Guam court has also set a scheduling conference for December 12, 2006.[29] Discovery should be well under way in the Guam suit by the end of the year.

In light of the progress and timing of this lawsuit compared to the Guam suit, this second-filed case is a waste of judicial resources created by Fujitsu Ltd's and FMA's attempt to forum shop. The court should therefore dismiss this case, transfer it to the District of Guam, or stay it pending the outcome of the case in Guam.

II. ARGUMENT — THE FIRST-TO-FILE RULE WARRANTS A DISMISSAL, TRANSFER, OR STAY

Where there are two competing patent cases, such as this case and the first-filed Guam suit that involve the same patents and same litigants, the Federal Circuit has mandated that the "first-to-file" rule should be applied. *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 937 (Fed. Cir. 1993) ("We prefer to apply in patent cases the general rule whereby the forum of the first-filed case is favored unless considerations of judicial and litigant economy, and the just and effective disposition of disputes, require otherwise."). The first-to-file rule is also recognized in the Ninth Circuit as a doctrine of federal comity that permits the Court to dismiss an action when a complaint "involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). The purpose of this well-established first-to-file rule is to promote efficiency by avoiding duplicative litigation; thus, ***it "should not be disregarded lightly."*** *Alltrade Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991).

There are three factors courts in this district evaluate when applying the first-filed rule:

(1) the chronology of the two actions,

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[27] *Id.* ¶ 18.
[28] *Id.* ¶ 19.
[29] *Id.* ¶ 18, Scheduling Not., Dkt. No.2, *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. CV-06-00025 (D. Guam).

(2) the similarity of parties, and

(3) the similarity of the issues.

N. Am. Cas. Ins. Co. v. Encompass Power Servs., Inc., No. CIV-S-05-1587 DFL GGH, 2005 U.S. Dist. LEXIS 33314, *8 (E.D. Cal. 2005).

If these three factors apply, then the Court should dismiss or transfer this case unless there is a "sound reason that would make it unjust or inefficient to do so." *Genentech*, 998 F.2d at 938. No such "sound reason" exists in this case. Ninth Circuit law may also allow a court to disregard the first-filed rule, but only in cases where there is bad faith, an anticipatory suit, or forum shopping. *Alltrade*, 946 F.2d at 628.[30] These three factors tend to boil down simply to whether a reasonable attempt at settlement was made before suit. *Z-Lines Design Inc. v. Bell'O Int'l. LLC*, 218 F.R.D. 663, 666-67 (N.D. Cal. 2003); *Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-05340 JF, 2004 U.S. Dist. LEXIS 27601, *17 (N.D. Cal. 2004). Not only did NTC try for several years to settle this controversy, but justice and convenience also strongly favor the Guam Suit.

A. THE CHRONOLOGY OF THE TWO ACTIONS — THE GUAM SUIT WAS FILED FIRST

It is evident from looking at PACER that NTC filed the Guam case six weeks before Fujitsu Ltd. filed this action. It is also evident that Fujitsu Ltd. received a copy of the Guam suit on September 14, 2006 during settlement discussions in Tokyo.[31] In fact, Fujitsu Ltd. admits that this case was filed in reaction to the Guam Suit,[32] and there is no reason to disregard this chronology simply because the two sides were in settlement discussions. *See Google*, U.S. Dist. LEXUS 27601, at *11; *Ward v. Follett Corp.*, 158 F.R.D. 645, 647 (N.D. Cal. 1994). Finally, the Guam Suit was not anticipatory. There was no reason for NTC to believe that a U.S. patent lawsuit by Fujitsu Ltd. was imminent. The parties' Japanese settlement negotiations had simply stalled due to Fujitsu Ltd.'s illegal efforts to tie access to the Japanese market to payment of worldwide royalties on U.S. patents that are invalid, unenforceable,

[30] Note that Federal Circuit and Ninth Circuit law tend to diverge on the point of whether it is relevant that the first-filed suit was anticipatory. *See Electronics for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347 (Fed. Cir. 2005) (holding that the district court abused its discretion in refusing to apply the first-filed rule due to the anticipatory nature of the first-filed action).

[31] Chan Decl. ¶ 10.

[32] Fujitsu Limited's Mem., *supra* note 11, at 3.

expired, and not infringed. The Guam suit also seeks enforcement of NTC's own patents that Fujitsu Ltd. and FMA continue to infringe.

B. THE PARTIES ARE THE EXACT SAME IN BOTH CASES

The second factor --- similarity of the parties --- clearly favors application of the first-filed rule. From the face of the complaint in this case and the complaints in the Guam case, it is clear that the parties are identical.[33]

C. THE FACTUAL AND LEGAL ISSUES ARE SIMILAR IN BOTH CASES

All of the legal issues that Fujitsu Ltd. and FMA ask this Court to adjudicate are currently pending in Guam. In this action, Fujitsu Ltd. and FMA claim NTC and NTC USA are infringing certain of its patents. NTC, however, had already requested a declaratory judgment of non-infringement in the Guam case regarding the very same patents. *Genetech*, 998 F.2d at 937 (noting that the first-to-file rule favors the first-filed action regardless of whether it is an action seeking affirmative relief or a declaratory judgment of non-infringement). In addition, Fujitsu Ltd. and FMA seek a declaratory judgment of non-infringement regarding the NTC patents that NTC asserted in the Guam action. In other words, all of the patents at issue in this case are at issue in the first-filed Guam case as shown in the following table:

PA[illegible] AT IS[illegible]	
Gu[illegible]on	n Fi[illegible]
Fujitsu's U.S. Patents	**Fujitsu's U.S. Patents**
4,384,918	---
4,458,336	---
4,527,070	---
4,539,068	---
4,641,166	---
4,692,689	---
4,801,989	4,801,989
5,227,996	---
5,339,273	---
5,397,432	---
5,688,712	---

[33] Chan Decl. ¶ 17.

5,841,731	---
6,104,486	6,104,486
6,292,428	6,292,428
6,320,819	6,320,819
Fujitsu's Japanese Patents	**Fujitsu's Japanese Patents**
2063684	---
3253712	---
3270831	---
Fujitsu's Taiwanese Patents	**Fujitsu's Taiwanese Patents**
119,726	---
400,635	---
Fujitsu's German Patent	**Fujitsu's German Patent**
234891	---
Fujitsu's Korean Patent	**Fujitsu's Korean Patent**
316813	---
Nanya's U.S. Patents	**Nanya's U.S. Patents**
6,225,187	6,225,187
6,426,271	6,426,271
6,790,765	6,790,765

The fact that the Guam complaint contains additional causes of action and additional patents makes no difference. "The 'sameness' requirement does not mandate that the two actions be identical, but is satisfied if they are 'substantially similar.'" *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006).

NTC and NTC USA have additional claims of patent misuse and antitrust violations in the Guam action, but these are intertwined with the defenses that they would have to assert in this case. Fujitsu Ltd. has used threats and coercion to unlawfully intimidate NTC into paying licensing fees on patents that NTC did not and does not infringe, patents that are expired, invalid patents, unenforceable patents, and foreign patents that are not entitled to exclusivity or enforcement in the United States. These coercive acts are an illegal attempt to expand Fujitsu Ltd.'s patent protections beyond their permitted temporal and territorial scopes and obtain an unlawful monopoly on intellectual property related to the design and manufacture of computer memory chips, specifically DDR SDRAM found in personal computers and other electronic devices. This type of patent misuse renders a Fujitsu Ltd.'s patents unenforceable. Thus, NTC's patent misuse and antitrust claims in Guam are intertwined with Fujitsu

Ltd.'s patent claims and NTC's defenses in this case. All of these issues should be adjudicated in only one action in one forum, Guam.

D. NTC HAD SOUND REASONS TO FILE ITS CASE IN GUAM AND NOTHING MAKES ENFORCEMENT OF THE FIRST-FILED RULE UNJUST OR INEFFICIENT

NTC had "sound reasons" for choosing Guam as the forum for its claims — convenience of the parties and the proximity of the witnesses. *Serco Servs. Co. v. Kelly Co., Inc.*, 51 F.3d 1037, 1040 (Fed. Cir. 1995) (noting that convenience of witnesses is a sound reason supporting application of the first-filed rule); *Electronics for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347-48 (Fed. Cir. 2005) (holding that there must be a sound reason or "compelling factors" ***not*** to enforce the first-filed rule such that doing so would be unjust or inefficient).

The United States District Court in Guam is the closest forum to both NTC's and Fujitsu Ltd.'s primary offices. Fujitsu Ltd.'s and FMA's decision makers are in Tokyo, Japan. Tokyo, Japan is where ***all*** the settlement negations have taken place. NTC is in Taipei, Taiwan. Instead of flying thirteen hours from Tokyo to San Francisco, Fujitsu Ltd.'s and NTC's key witnesses can fly three and one-half hours to Guam. There is only a one hour time difference between Tokyo and Guam — compared to eighteen-hour time difference with San Francisco. In other words, all of the relevant witnesses, documents, and evidence are closer to Guam than San Francisco.

Dismissing, transferring, or staying this case also promotes efficiency. There is no sound rationale for two different courts to adjudicate the same lawsuit. The onerous burden and tremendous inefficiency of two different courts conducting *Markman* hearings on the same patents is clearly a waste of judicial resources. This duplication of efforts will only exacerbate problems of congestion in the courts. More importantly, substantially similar concurrent suits create the very real danger of producing conflicting constructions of the same claims, resulting in disparate judicial conclusions on identical questions of law. *See, e.g., Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 816 (1976) (noting that courts should consider "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation") (quoting *Kerostat Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

III. SUMMARY & PRAYER

Defendants filed the Guam suit six weeks before Plaintiffs filed this suit. The parties in the Guam suit are identical to the parties in this suit. The issues in the two suits are substantially related. There is no sound reason not to enforce the first-filed rule and dismiss this case, or, in the alternative, transfer this case to the District of Guam, or, in the alternative, stay this case pending the outcome of the Guam Suit

Respectfully Submitted,

Dated: November 22, 2006

By: _____

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

FUJITSU LIMITED and FUJITSU MICROELECTRONICS AMERICA, INC.

Plaintiffs,

vs.

NTC TECHNOLOGY CORP. and NTC TECHNOLOGY CORP. U.S.A.

Defendants.

No. CV-06 06613 CW

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, TRANSFER OR STAY CASE

Date: February 2, 2007
Time: 10:00 am
Location: Courtroom 2, 4th Floor

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TABLE OF AUTHORITIES

FEDERAL RULES

Plaintiffs Fujitsu Ltd. and Fujitsu Microelectronics Inc.'s ("FMA") response fails to show "sound reasons" why this Court should not apply the first-filed rule and dismiss or transfer this case. Instead, Plaintiffs grasp at straws. First, they ask this Court to make a personal jurisdiction determination for the District Court in Guam—as if this Court could somehow dismiss the Guam case. But Fujitsu Ltd. and FMA's response fails to address the main point—why Fujitsu Ltd. and FMA should be able to maintain a duplicative lawsuit. Fujitsu Ltd. and FMA even argue convenience, but they ignore the terrible inconvenience of maintaining two identical lawsuits in separate districts. In reply, Nanya Technology Corp. ("NTC") and Nanya Technology Corp. U.S.A. ("NTC USA") show why the Guam court has personal jurisdiction over Plaintiffs and that venue is proper in Guam, but NTC and NTC USA note that this determination will be made by the Guam court.

Second, Plaintiffs argue that by seeking declaratory relief on an additional patent or because NTC USA was added as a plaintiff in the Guam suit, NTC and NTC USA's amended complaint in Guam became a second-filed action. But by examining the two Guam complaints, one can see that the additional patent claim in the amended complaint relates directly to NTC and NTC USA's antitrust and patent misuse claims—the very same conduct described in the original complaint. Further, NTC and the additional party, NTC USA, have identical interests and seek the same relief for Fujitsu's same bad conduct. Thus, the amended Guam complaint relates back to the original Guam complaint, which was filed six weeks before Plaintiffs filed this case.

Finally, there is nothing "anticipatory" about waiting seven years for settlement negotiations to break down to finally sue Fujitsu Ltd. and FMA in the United States district court closest to Taiwan. The bottom line is that the District of Guam is still the closest district to Japan and Taiwan, the residence of most party witnesses, non-party witnesses, and the location of essentially all relevant documents. These were "sound reasons" for filing the case there, and nothing in Plaintiffs' response refutes that. Defendants therefore respectfully request that the Court dismiss this case, transfer it to the District of Guam, or stay the case pending the outcome of the Guam litigation.

I. GUAM IS A PROPER VENUE

In defense of their forum shopping, Fujitsu Ltd. and FMA claim that Guam is an improper venue because they are not subject to personal jurisdiction in Guam. Plaintiffs are wrong. The district court in Guam has personal jurisdiction over Fujitsu Ltd. and FMA because Plaintiffs' infringing products are sold in that district. Furthermore, the Clayton Act merely requires that Fujitsu Ltd. and FMA have minimum contacts with any judicial district within the United States as a prerequisite to the Guam court's proper exercise of personal jurisdiction.

A. PLAINTIFFS' SALE OF INFRINGING PRODUCTS IN GUAM SUBJECTS THEM TO PERSONAL JURISDICTION

Fujitsu Ltd. and FMA's exclusive reliance on Ninth Circuit case law to support their claim regarding personal jurisdiction is misplaced. Personal jurisdiction in patent cases is determined under the law of the Federal Circuit, not the law of the regional circuit in which the case arises. *Akro Corp. v. Luker*, 45 F.3d 1541, 1543 (Fed. Cir. 1995). According to Federal Circuit precedent, determining whether personal jurisdiction exists over an out-of-state defendant involves two inquiries: (1) whether a forum state's long arm statute permits service of process, and (2) whether the assertion of personal jurisdiction would violate due process. *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1360 (Fed. Cir. 2001). Because Guam's long-arm statute extends the reach of personal jurisdiction to the limits of the Constitution, the two inquiries collapse into whether jurisdiction comports with due process. *Abaun v. General Electric Co.*, 735 F. Supp. 1479, 1481 (D. Guam 1990); *Inamed*, 249 F.3d at 1360. Due process requires that a two-prong test be met for the exercise of personal jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). First, the plaintiff must show that the defendant has "minimum contacts" with the forum state. *Id.* at 316. Second, the plaintiff must show that exercising personal jurisdiction over the defendant comports with traditional notions of fair play and substantial justice. *Id.* at 316.

The necessary "minimum contacts" between Fujitsu Ltd., FMA, and Guam are established under the "stream of commerce" standard first discussed by the Supreme Court in

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Under this standard, the exercise of personal jurisdiction is appropriate where the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *Id.* at 298. "[I]f the sale of a product of a manufacturer or distributor. . . is not simply an isolated occurrence, but arises from the efforts of the [defendant] to serve, directly or indirectly, the market for its products . . . it is not unreasonable to subject it to suit." *Id.* at 297.

The Federal Circuit adopted and applied the stream of commerce standard in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994). In *Beverly Hills Fan*, the plaintiff, a California ceiling fan manufacturer, sued both the manufacturer and distributor of a competing ceiling fan in the Eastern District of Virginia alleging patent infringement. Ultec, the manufacturer of the infringing fans, was a Chinese corporation that made the infringing fans in Taiwan. The fans were then imported into the United States by defendant Royal. Royal sold the fans to Builder's Square, a retail chain that operated stores located throughout Virginia.

The Federal Circuit rejected the defendants' claims that the court lacked personal jurisdiction, finding that the exercise of personal jurisdiction was proper because the accused fans arrived in that forum through the defendants' purposeful shipment of fans through an established distribution channel. *Id.* at 1565-66. Specifically, the court held that:

> When viewed in the light of the allegations and the uncontroverted assertions in the affidavits, plaintiff has stated all of the necessary ingredients for an exercise of jurisdiction consonant with due process: defendants, acting in consort, placed the accused fan in the stream of commerce, they knew the likely destination of the products and their conduct and connections with the forum state were such that they should reasonably have anticipated being brought into court there.

Id. at 1566. Put simply, personal jurisdiction over a defendant in a patent infringement case is proper where infringing products are sold because that is where the injury occurs. *North Am. Philips Corp. v. American Vending Sales*, 35 F.3d 1576, 1580 (Fed. Cir. 1994) ("Surely the reasonable market participant in the modern commercial world has to expect to be haled into the courts of that state, however distant, to answer for any [patent infringement] liability based at

least in part on that importation."). Plaintiffs' page-and-a-half recitation about not maintaining offices in Guam, not having employees in Guam, and not paying taxes in Guam is simply irrelevant.

Fujitsu Ltd. and FMA misrepresent the law when they urge that this Court use some other standard or that the Court should consider "the volume, the value, and the hazardous character of the components" to determine if Fujitsu Ltd. and FMA have a reasonable expectation of being hailed into court in Guam. (Pl.s' Resp. to Mot. to Dismiss, Transfer or Stay pg. 9 line 22-24.) The Federal Circuit has expressly rejected that standard stating: "That test, designed for products liability cases, is inapplicable to actions for patent infringement." *Commisariat A L'Energie Atomique v. Chi Mei Optoelectronic Corp.*, 395 F.3d 1315, 1321 n.6 (Fed. Cir. 2005).

Nowhere in Fujitsu Ltd. and FMA's brief do they deny that they sell memory chips and microcontrollers through established distribution channels in Guam. That is because they cannot make this claim; Plaintiffs' infringing devices are incorporated into cell phones, scanners, automobiles, digital cameras, flash drives, personal computers, copiers, and many other products.[1] NTC and NTC USA have identified several products that Fujitsu Ltd. and FMA sell through established distribution channels that they believe infringe their patents as illustrated in the table below.

Fujitsu Product	Product Name or No.	Location
Glucose Meter	One Touch Ultra	Dededo, Guam
Automobile Entertainment	Hyundai Most System	Press Release on Website
Thermostat	Digimax 210 Wireless Room Thermostat DX210	Hagana, Guam
Flash Drive	MBF310 Sweep Sensor	Hagana, Guam
Microcontroller	MB91F133A	Hagana, Guam

[1] http://www.fujitsu.com/global/services/microelectronics/.

Microcontroller	MB91F362GAPFVS	Hagana, Guam
Microcontroller	MB91188	Hagana, Guam
Microcontroller	DIPmodul-F40	Hagana, Guam

Furthermore, NTC and NTC USA have already begun jurisdictional discovery in the Guam case to conclusively establish what it already knows—Fujitsu Ltd. and FMA knowingly sell a substantial amount of infringing products in Guam through well established distribution channels, including their own website.[2] These sales and marketing activities constitute the minimum contacts necessary for the Guam court to exercise personal jurisdiction in a patent case. *Id.* at1323-24. NTC and NTC USA's factual allegations suffice to make a *prima facia* showing of jurisdictional facts. *See e.g. Agilent Techs., Inc. v. Elan Microelectronics Corp.*, No. C 04-05385-JW, 2005 U.S. Dist. LEXIS 34305 (N.D. Cal. 2005). Thus, Defendants are confident that the court in Guam will conclude that it has personal jurisdiction over Plaintiffs and that Guam is a proper venue.

B. PLAINTIFFS IGNORE THE STANDARD FOR PERSONAL JURISDICTION UNDER THE CLAYTON ACT

In addition, Fujitsu Ltd. and FMA choose to ignore the other obvious basis for personal jurisdiction in Guam—United States antitrust law. NTC and NTC USA are seeking relief in Guam for Fujitsu Ltd. and FMA's violations of the Sherman and Clayton Acts based on their coercive misuse of their patent portfolio and their illegal attempt to exercise monopoly pricing power in the SDRAM market.

Under the Clayton Act, the district court in Guam "obtains personal jurisdiction over a defendant if it is able to serve process on him." *Action Embroidery Corp. v. Atl. Embroidery, Inc.* 368 F.3d 1174, 1177 (9th Cir. 2004). A statutory basis for exercising personal jurisdiction may

[2] http://www.fujitsu.com/global/.

be found in a statute providing for service of process. That basis can be found in Section 12 of the Clayton Act, which contains its own statutory long arm statute:

> Any suit, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, ***or wherever it may be found.***

15 U.S.C. § 22. FMA is not disputing service in Guam, and although Fujitsu Ltd. is arguing that it was not properly served, it is not arguing whether the district court can properly serve it. So the only issue is whether the Guam court's exercise of personal jurisdiction over Fujitsu Ltd. and FMA satisfies the constitutional principles of due process and comports with "traditional notions of fair play and substantial justice." *Action Embroidery Corp.*, 368 F.3d at 1180.

These constitutional considerations are met if Fujitsu Ltd. and FMA have minimum contacts with the forum state. *Id.* at 1180. Under the Clayton Act, minimum contacts with the forum state means minimum contacts with the United States because the statute expressly authorizes nationwide (and worldwide) service. *Id.* at 1180. Thus, the inquiry to determine "minimum contacts" becomes "whether the defendant has acted within ***any*** district of the United States or sufficiently caused foreseeable consequences in this country." *Id.* at 1180 (citing *Securities Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985)). Thus, Plaintiffs' claim that they have no "relationship" with Guam in particular, is irrelevant.

As a California corporation, operating in the United States, FMA clearly has minimum contacts with a district of the United States sufficient to confer personal jurisdiction on any district court, including the District of Guam. *Id.* at 1180.

Likewise, Fujitsu Ltd. conducts substantial business in the United States. According to Fujitsu Ltd.'s own website, 8.1% of its revenue is derived from sales in the United States.[3] Fujitsu Ltd. exports a wide variety of products to the United States that it sells through numerous wholly-owned subsidiaries. It sells computers that contain its memory chips via the internet to

[3] http://www.fujitsu.com/global/about/profile/.

the United States.[4] Fujitsu Ltd. applies for patent protection in the United States and obviously files lawsuits in United States district courts to enforce its patents. Fujitsu Ltd. also regularly contracts with United States companies to sell its products. If those companies breach such agreements, Fujitsu Ltd. sues them in United States courts.[5] Furthermore, a search on PACER reveals that Fujitsu Ltd. is a defendant in no fewer than ***29 current antitrust cases*** related to its sale of memory chips in the United States.

Moreover, Fujitsu Ltd.'s improper and coercive licensing efforts are directed squarely at the United States market. Fujitsu Ltd. is demanding that NTC pay a license for Fujitsu Ltd.'s expired or invalid patents based on NTC's sales volume in the United States. These jurisdictional facts are set forth in detail in NTC and NTC USA's complaint in the Guam action and remain uncontroverted. Thus, Plaintiffs' claim that the Guam court lacks personal jurisdiction and that Guam is an improper venue must fail. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (stating that where not directly controverted, the plaintiff's version of the facts are taken as true for the purposes of establishing personal jurisdiction). The district court in Guam has personal jurisdiction over Plaintiffs, and Guam is a proper venue.

Plaintiffs' venue argument is a red herring and cannot be a "compelling reason" to prevent the application of the first-filed rule. Thus, the Court should dismiss, transfer, or stay this case, which was filed six weeks after the Guam case.

II. NTC'S AMENDED COMPLAINT RELATES BACK TO THE ORIGINAL COMPLAINT

According to Federal Rule of Civil Procedure 15(c)(2), an amended complaint "relates back" for purposes of the filing date, if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."[6] The additional claim for declaratory relief regarding Fujitsu Ltd.'s U.S.

[4] http://www.fujitsu.com/us/services/computing/

[5] *See Fujitsu Limited v. Cirrus Logic, Inc. et al*, Case Number 5:02-cv-01627, In the United States District Court for the Northern District of California.

[6] Fed. R. Civ. P. 15(c)(2).

Patent No. 6,104,486 (the "486 patent") or the addition of antitrust claims by NTC USA in the amended Guam complaint obviously arise from the same conduct set forth in the original Guam complaint. There is no good faith argument that the amended Guam complaint does not "relate back."

A. DEFENDANTS' DECLARATORY RELIEF CLAIM REGARDING THE '486 PATENT RELATES TO PLAINTIFFS' UNLAWFUL CONDUCT

The Guam litigation arises out of two types of wrongful conduct by Fujitsu Ltd. and FMA: (1) Fujitsu Ltd. and FMA's attempt to extort a worldwide license on their foreign patents and U.S. patents that have expired or are invalid (the "antitrust conduct"), and (2) Fujitsu Ltd. and FMA's continued infringement of NTC's patents. The amended complaint merely adds claims that arise out of Plaintiffs' antitrust misconduct, which was described in the original complaint.

NTC was already seeking declaratory relief regarding 14 other patents in the Guam suit when Fujitsu Ltd. asserted its infringement claim regarding the '486 patent in this case. Fujitsu Ltd.'s claim is merely another instance of Fujitsu Ltd. attempting to unlawfully intimidate NTC into paying licensing fees on patents that NTC did not and does not infringe, patents that are expired, and foreign patents that are not entitled to exclusivity or enforcement in the United States. So NTC and NTC USA amended their Guam complaint to request declaratory relief regarding the '486 patent because it is related to the same wrongful conduct pleaded in the original complaint. This also makes it easier for this Court to dismiss or transfer the case to Guam because of the similarity of issues. Thus, under Rule 15(c)(2), the addition of a request for declaratory relief of non-infringement, invalidity, and unenforceability of the '486 patent does not prevent NTC's amended complaint from relating back to the original complaint.

B. NTC USA IS A RELATED PARTY AND ITS CLAIMS ARISE OUT OF FUJITSU'S SAME MISCONDUCT

The addition of NTC USA, a related plaintiff who has the same interests as the original plaintiff in the Guam litigation, does not prevent the amended complaint from relating back to the original complaint. *Bowles v. Reade*, 198 F.3d 752, 762 (9th Cir. 1999) ("an amendment changing plaintiffs may relate back when the relief sought in the amended complaint is identical to that demanded originally.") Plaintiffs' conclusory claim that NTC and NTC USA do not have identity of interests is absurd. NTC USA is a wholly-owned subsidiary of NTC, and it clearly has an identical objective as its parent, to stop Fujitsu Ltd. and FMA's attempt to monopolize the SDRAM market and prevent competition in the United States market.

Both NTC and NTC USA will be injured in exactly the same way, if not to the same extent, if they do not stop Fujitsu Ltd. and FMA's predatory and monopolistic licensing misconduct. *Besig v. Dolphin Boating and Swimming Club*, 683 F.2d 1271, 1278 (9th Cir. 1982) ("an amended complaint substituting plaintiffs relates back only when the relief sought is sufficiently similar to constitute an identity of interest.") Thus, NTC and NTC USA have identical interests and identical claims. Both seek to declare Fujitsu Ltd.'s asserted patents invalid, unenforceable, or non-infringed and to free themselves from Fujitsu Ltd.'s anticompetitive licensing demands. Because the antitrust injury "asserted in the amended pleading [arises] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," NTC's amended complaint relates back to the filing date of the original complaint. FED. R. CIV. P. 15(c)(2).

Furthermore, NTC and NTC USA share a common interest in their patent infringement claims against Fujitsu Ltd. and FMA. Both NTC and its subsidiary NTC USA deal in the same products. Thus, the Guam court will conduct only one infringement analysis for both NTC's and NTC USA's products.

The amended complaint relates back to the original complaint. The Guam case was the first-filed case, period. Thus, this action should be dismissed under the first-filed rule or in the

alternative transferred to the District of Guam.

III. THERE IS NOTHING ANTICIPITORY ABOUT WAITING SEVEN YEARS TO SUE

Citing *Z-Line Designs, Inc. v. Bell'O Int'l LLC* 218 F.R.D. 663, 665 (N.D. Cal. 2003) in their response, Plaintiffs claim that NTC raced to the courthouse to file suit in Guam after receiving a list of patents from Fujitsu Ltd. Therefore, Plaintiffs argue, the Court should not apply the first-filed rule. (Pl.s' Resp. to Mot. to Dismiss, Transfer or Stay pg. 16.) There is no support for such an argument in *Z-line* or any other case. In *Z-Line*, the patent owner, Bell'O International, sent a demand and cease and desist letter from New Jersey on June 23 to Z-Line in California that outlined Bell'O's intellectual property claims and set July 7 as the deadline to respond. *Id.* at 664. That deadline came and went and after several telephone calls between the parties' counsel, Bell'O set a final deadline of July 29 for Z-line to respond to its demand. *Id.* at 664-65. On July 30, Z-Line sued Bell'O in California. Two days later, Bell'O sued Z-Line in New Jersey. The court determined that the first lawsuit was "anticipatory" because the "plaintiff filed this action in anticipation of specific, concrete indications that a suit by Bell'O was imminent." *Id.* at 666. The court further found that the two-day difference between the filing of the two lawsuits diminished the importance of the earlier filed suit. *Id.* at 667. That is not the case here.

Fujitsu Ltd. did not even indicate, much less give a deadline, that it would sue in a United States court. Fujitsu Ltd. cannot point to a demand letter like the one in *Z-line* that contains any deadline. In fact, Plaintiffs claim that NTC had to coerce a letter out of Fujitsu Ltd. that lists the patents that NTC allegedly infringes.[7] Furthermore, Fujitsu Ltd. never indicated that a suit was imminent. Fujitsu Ltd.'s August 11, 2006 letter listing the patents that NTC and NTC USA allegedly infringe states that settlement negotiations have been ongoing since 1999.[8] Plaintiffs admit in their response that settlement negotiations have been ongoing for years, then in the same

[7] Plaintiffs' Opp. to Def.s' Mot. to Dismiss, Transfer, or Stay Case at 3.

[8] August 11, 2006 Ltr. from Fujitsu Ltd. to NTC attached as Ex. B to Kitano Decl.

brief claim that this suit was sprung on them before they could file suit.[9] There were no specific concrete indications that Fujitsu Ltd.'s lawsuit, filed ***six weeks*** after the Guam suit, was imminent at the time NTC filed the Guam suit. Thus, the Guam suit was not anticipatory. *Id.* at 666.

NTC did request a list of patents from Fujitsu Ltd. for the settlement negotiations in Tokyo, Japan. That list contained several expired and invalid foreign and U.S. patents.[10] Contrary to Plaintiffs' assertions, NTC used that list in settlement negotiations, but it also used it to show on paper what Fujitsu Ltd. has been asserting in negotiations for years—Fujitsu Ltd.'s demand that NTC take a worldwide license for expired or invalid patents. Plaintiffs' claim that the Guam case is merely a tactic to increase settlement pressure on the Tokyo case is incorrect. The Guam case is about damages for serious antitrust violations and patent misuse. Far from seeking to gain an advantage in the Tokyo District Court which concerns one Japanese patent, NTC and NTC USA filed suit in Guam because of Fujitsu Ltd.'s persistent and continued demand that NTC take a ***worldwide*** license for foreign and expired patents to settle the Japanese lawsuit. NTC and NTC USA note that Plaintiffs only asserted infringement of a handful of all the patents listed in Fujitsu Ltd.'s August letter in this lawsuit. That letter is not evidence of Defendants' gamesmanship; it is evidence of Fujitsu Ltd.'s guilt.

IV. SOUND REASONS—NOT FORUM SHOPPING

NTC had "sound reasons" for choosing Guam as the forum for its claims—convenience of the parties and the proximity of the witnesses. *Serco Servs. Co. v. Kelly Co., Inc.*, 51 F.3d 1037, 1040 (Fed. Cir. 1995) (noting that convenience of witnesses is a sound reason supporting application of the first-filed rule); *Electronics for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347-48 (Fed. Cir. 2005) (holding that there must be a sound reason or "compelling factors" ***not*** to enforce the first-filed rule such that doing so would be unjust or inefficient). Plaintiffs' response simply ignores the standard the Federal Circuit has articulated when applying the first-filed rule.

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[9] Pl.s' Opp. To Def.s' Mot. to Dismiss Transfer or Stay at 16.

[10] August 11, 2006 Ltr. from Fujitsu Ltd. to NTC attached as Ex. B to Kitano Decl.

Nothing in Plaintiffs' response refutes the following:

- The United States District Court in Guam is the closest forum to both NTC's and Fujitsu Ltd.'s primary offices;
- Fujitsu Ltd.'s decision makers are in Tokyo, Japan;
- NTC's decision makers are in Taiwan;
- Tokyo, Japan is where ***all*** the settlement negations have taken place;
- Most of the witnesses, including the inventors of the patents at issue reside in Japan or Taiwan;
- There is only a one hour time difference between Tokyo and Guam — compared to eighteen-hour time difference with San Franscisco;
- Flights to Guam from Japan and Taiwan are a third as long as they are to San Francisco;
- Dismissing, transferring, or staying this case promotes judicial efficiency;
- Litigating in one forum will be much cheaper and more efficient for the parties;
- The Guam litigation will dispose of all of the issues and claims between the parties and not just Fujitsu Ltd.'s infringement claims on a handful of the total number of patents; and
- Dismissing the case eliminates the danger of producing conflicting claim constructions of the same terms, resulting in disparate judicial conclusions on identical questions of law.

While it is true as Plaintiffs state in their response that the Guam court is the farthest court from the continental United States, it is also true that it is the closest court to the relevant witnesses and evidence. The parties in the Guam suit are identical to the parties in this suit. The issues in the two suits are substantially related. Finally, the Guam suit was filed six weeks before Plaintiffs filed suit in this district.

There is no sound reason not to enforce the first-filed rule and dismiss this case, or, in the alternative, transfer this case to the District of Guam, or, in the alternative, stay this case pending

the outcome of the Guam suit.

Dated: January 19, 2006

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